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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1974**

**No. 74—1060**

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FORTH CORPORATION and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,

*Petitioners,*

v.

ALLEGHENY AIRLINES, INC. and UNITED STATES OF AMERICA,

*Respondents.*

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## BRIEF OF RESPONDENT ALLEGHENY AIRLINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*Respondents,*

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## BRIEF OF RESPONDENT ALLEGHENY AIRLINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Allegheny Airlines, Inc., submits this brief in opposition to the petition filed by petitioners for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

### Citations to Opinions Below

The opinion of the Court of Appeals (Petition, Appendix A) is reported at 504 F. 2d 400. The decision by the Court of Appeals denying the petitioners' request for a rehearing *en banc* is contained in Appendix C of the petition.

### Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

## Question Presented

Did the Court of Appeals correctly hold that the District Court was in error in dismissing under Rule 12(b)(6), Fed. R. Civ. P., respondents' cross-claims and third-party complaints for indemnity and/or contribution for failure to state a claim upon which relief can be granted?

## Statutes Involved

Those statutes that may be involved herein are set forth in Appendix D of the petition.

## Statement

This case arises out of a mid-air collision which occurred on September 9, 1969, in the airspace over Fairland, Indiana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert Carey. The Piper Cherokee was owned by Forth Corporation, a wholly owned subsidiary of Brookside Corporation. All occupants of both aircraft were killed in the accident.

The Allegheny aircraft was operated as Flight No. 853 en route from Cincinnati, Ohio, to Indianapolis, Indiana. At the time of the collision Flight No. 853 was flying under an instrument flight rules clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar direction from an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Indianapolis Weir Cook Airport. The Piper Cherokee Aircraft was operated by Carey, a student pilot, under visual flight rules. At the time of the collision Carey was engaged in a solo cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana. As a result of the mid-air collision

both aircraft were totally destroyed and all eighty-three occupants were killed.

Subsequent to the accident, wrongful death actions were commenced on behalf of the estates of all the deceased passengers save one, the estates of three of the four Allegheny crew members, and the estate of Robert W. Carey. In addition, property damage suits were initiated to recover for the destruction of the two aircraft. All of these suits were commenced in various federal district courts on the basis of diversity of citizenship as to defendants Allegheny, Brookside, Forth and the estate of Carey, and the Federal Tort Claims Act as to the defendant United States. The Judicial Panel on Multidistrict Litigation assumed jurisdiction over the various actions commenced outside of Indiana and pursuant to 28 U.S.C. § 1407 transferred them to the United States District Court for the Southern District of Indiana for the purpose of supervision of the pretrial discovery. *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (JPML 1970). Subsequent to the section 1407 transfer, the District Court judge issued orders pursuant to 28 U.S.C. § 1404 transferring cases from respective transferor forums to the United States District Court for the Southern District of Indiana and consolidated those cases with other companion cases that had been initially commenced in the Indiana District Court. By the time of trial Allegheny and the United States had filed cross-claims and third-party complaints against Brookside, Forth and the estate of Carey seeking indemnity and contribution.

The first group of passenger cases was assigned to trial on February 22, 1972. The district judge severed all cross-claims and third-party complaints between the parties and deferred resolution of those issues until a future date. After the commencement of the February trial which involved as defendants Allegheny, the United States, Brookside, Forth and the estate of Carey, an agree-

ment was arrived at between the United States and the liability insurers of Allegheny for a pro-rata formula to be utilized between them in disposing of all cases, whether by settlement or judgment. The defendants Forth, Brookside and the estate of Carey were not parties to and did not contribute anything to or under the agreement. Thereafter, on motion of plaintiffs and defendants Allegheny and the United States, the first group of passenger cases on trial were terminated and all claims, cross-claims and third-party complaints were dismissed without prejudice pending a hearing on the reasonableness of the compromise. The District Court found the compromise to be reasonable and accordingly Allegheny's insurers and the United States proceeded to settle the remaining passenger cases.

On December 5, 1972, the District Court entered an order dismissing all actions including the plaintiffs' complaints as well as defendants' cross-claims, third-party complaints and counterclaims. All such claims were to be dismissed with prejudice as of January 5, 1973. Both Allegheny and the United States moved to vacate the December 5 entry objecting to the dismissal with prejudice of their claims over for indemnity and contribution against Forth, Brookside and the estate of Carey. At a hearing on January 5, 1973, the district judge vacated its prior order of December 5, 1972, and directed that the plaintiffs' actions were to be dismissed without prejudice. At the same time the district judge allowed defendants Forth, Brookside and the estate of Carey to file additional paragraphs of their answer pleading the defenses of *res judicata,* collateral estoppel, voluntary payment, accord and satisfaction, and failure to state a claim for relief in that no right to indemnity and contribution existed under Indiana law.

Thereafter, the Court proceeded to grant the motions of Forth, Brookside and the estate of Carey to dismiss the claims by Allegheny and the United States for indemnity

and contribution by virtue of the application of Indiana law. In addition, the Court granted summary judgment to Brookside, Forth and the estate of Carey on the basis of the affirmative defenses of voluntary payment and accord and satisfaction in that the memorandum of agreement between Allegheny's liability insurers and the United States and the settlement of actions pursuant thereto constituted voluntary payments and accords and satisfactions. The Court also granted summary judgment to Brookside on the separate defenses of *res judicata* and collateral estoppel as a result of the judgment entered in *Allegheny Airlines, Inc. and GECC Leasing Corp.* v. *United States of America, et al.*, 504 F. 2d 104 (7th Cir. 1974), in which it had been previously held that Brookside Corporation was not responsible for the torts committed by its wholly owned subsidiary Forth Corporation. The judgment entered applied to all cases.

Allegheny Airlines and the United States then appealed to the Court of Appeals on the grounds: (1) whether the District Court erred in dismissing the cross-claims and third-party complaints for indemnity and contribution for failure to state claims upon which relief may be granted; (2) whether the District Court correctly granted summary judgment to Brookside on the basis of *res judicata* and collateral estoppel; (3) whether the District Court properly entered summary judgment on the basis that settlement of plaintiffs' claims by Allegheny and the United States constituted voluntary payment which barred any claims by Allegheny and the United States against the defendants; (4) whether the District Court erred in granting summary judgment to Forth, Brookside and the estate of Carey on the ground that the agreement between Allegheny's liability insurers and the United States constituted an accord and satisfaction thereby barring any claim for indemnity and contribution; and (5) whether the District Court erred in entering an order dismissing all plaintiffs' claims without prejudice.

On September 20, 1974, the United States Court of Appeals for the Seventh Circuit issued its opinion (Appendix A of the Petition) in which it affirmed the District Court with respect to the judgment entered in favor of Brookside, and reversed the judgment in favor of Forth and LeMay holding that a claim for relief as to indemnity and contribution existed, that the settlements made by Allegheny's insurers and the United States did not bar their respective claims for indemnity and contribution, and that it was error for the District Court to have ignored the terms of the settlements and dismiss the deceased passengers' cases without prejudice when the settlement agreements called for dismissal with prejudice. A new trial was ordered with respect to the indemnity and contribution claims.

Forth and LeMay then petitioned the Court of Appeals for a rehearing *en banc,* and on November 26, 1974, said petition was denied by a vote of five to three. The instant petition for certiorari was filed herein on February 24, 1975.

## Argument

The petition for writ of certiorari should be denied because the petitioners seek review of a non-final order remanding the case to the District Court for a trial on the merits, and the decision below is correct in light of the current law and developing jurisprudence and not in conflict with the decisions of any other Courts of Appeals.

## POINT I.

**Since the case has been remanded for a trial on the merits, it does not warrant review at this time.**

The Court of Appeals remanded this case to the District Court for a trial on the merits to determine whether Al-

legheny Airlines and/or the United States was entitled to indemnity and contribution from Forth and/or LeMay. This type of non-final order should not be reviewed by this Court at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257-258, 36 S. Ct. 269, 60 L. Ed. 629 (1916).

It is hornbook law that a pleading should not be dismissed for failure to state a claim for relief unless it appears beyond doubt that the claimant can prove no set of facts in support thereof which would entitle him to relief. *Conley* v. *Gibson*, 355 U. S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Austin* v. *House of Vision, Inc.*, 385 F. 2d 171 (7th Cir. 1967); *Jung* v. *K. & D. Mining Co.*, 260 F. 2d 607 (7th Cir. 1958). This rule is equally applicable to cross-claims and third-party complaints for indemnity and/or contribution. *Gentry* v. *Wilmington Trust Co.*, 321 F. Supp. 1379 (D. Del. 1970); *Yanick* v. *Pennsylvania Railroad Co.*, 192 F. Supp. 368 (E.D.N.Y. 1961).

As is stated in Wright & Miller, *Federal Practice and Procedure*, Civil § 1363:

> "A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) goes to the sufficiency of the pleading under Rule 8(a)(2). Typically, the only information necessary for a decision on the motion is to be found in the pleading itself; if outside evidence is considered, the motion becomes one for summary judgment. Because of the nature of the objection presented by this motion, namely that the allegations in the pleading do not state a valid claim for relief, and the historical background of this motion, it being the modern counterpart to the demurrer and the code motion to dismiss, the courts have held that all of the allegations of the pleading are to be construed in the light most favorable to the pleader and accepted as true." Vol. 5, page 656.

It would therefore appear that once a court determines from a review of the pleading that it is possible that Allegheny Airlines could have a valid claim for indemnity and/or contribution under the law of some jurisdiction, the motion to dismiss under Rule 12(b)(6) should be denied. *Banks* v. *King Features Syndicate,* 30 F. Supp. 352 (S.D.N.Y. 1939). Thereafter, the actual validity of the claims must be based upon a *factual* determination of which jurisdiction has the most substantial interest in this particular issue.[1]

This factual determination may be resolved by a preliminary hearing as authorized by Rule 12(d), *Armstrong* v. *Udall,* 435 F. 2d 38 (9th Cir. 1970), cf. *National Hollow Brake Beam Co.* v. *Chicago Ry. Equipment Co.,* 168 Fed. 666 (7th Cir. 1909); or by summary judgment, *Kantlehner* v. *United States,* 279 F. Supp. 122 (E.D.N.Y. 1967), *Harris* v. *Pate,* 440 F. 2d 315 (7th Cir. 1971); or after a trial on the merits. *Emmert* v. *United States,* 300 F. Supp. 45 (D.C. 1969); *Chicago & N.W. R. Co.* v. *Chicago Packaged Fuel Co.,* 183 F. 2d 630 (7th Cir. 1950). None of these approaches was followed by the District Court.

As the Court of Appeals held in *Brown* v. *Quinlan,* 138 F. 2d 228 (7th Cir. 1943):

> "* * * To effect an involuntary termination of a suit requires, in the absence of waiver of final hearing, a hearing upon a motion for summary judgment or to dismiss the complaint. No such hearing was had. The complaint on its face was sufficient and it was error, therefore, finally to dispose of the cause without final hearing." 138 F. 2d at 229.

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[1] Indiana applies the law of the jurisdiction with the most substantial interest in the particular issue to be resolved. *Watts* v. *Pioneer Corn Co.,* 342 F. 2d 617 (7th Cir. 1965); *Motteler* v. *J. A. Jones Const. Co.,* 457 F. 2d 920 (7th Cir. 1972); *Witherspoon* v. *Salm,* 142 Ind. App. 655, 670, 237 N.E. 2d 116, rev'd on other grounds 243 N.E. 2d 876 (1968).

At any such hearing, the parties must be given an opportunity to present evidence and the Court must make findings of fact. *Marra* v. *Bushee*, 447 F. 2d 1282 (2d Cir. 1971); *King* v. *Wall & Beaver Street Corp.*, 145 F. 2d 377, 380-1 (D.C. Cir. 1944); cf. *Chance* v. *E. I. DuPont de Nemours & Co.*, 57 F.R.D. 165 (E.D.N.Y. 1972).

Since the District Court held no evidentiary hearing as to choice-of-law, the Court of Appeals was correct in reversing the judgment below and ordering a trial on the merits.[2]

## POINT II.

### The decision to apply federal law was correct and not in conflict with any other decisions by Courts of Appeals.

In remanding the case to the District Court for trial on the merits, the Court of Appeals stated that because of the particular facts in this accident federal law on indemnity and contribution should be applied. The correctness of this interpretation must be governed by the facts of this particular accident.

Most of the cases herein were in the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C.A. § 1404 transfers issued by Judge Cale J. Holder as transferee judge under 28 U.S.C.A. § 1407.[3] As the transfer orders indicate, cases were transferred to Indiana from New York, New Jersey, Connecticut, Mis-

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[2] The Court of Appeals in its opinion also stated: "Were it necessary, we would be inclined to agree with Allegheny that the district judge failed to engage in an adequate conflict of law analysis and that he erred on the application of Indiana law on contribution and indemnity." Petition, Appendix A, page A6.

[3] The power of a § 1407 transferee judge to transfer cases to himself under 28 U.S.C.A. § 1404 was upheld in *Pfizer* v. *Lord*, 447 F. 2d 122 (2d Cir. 1971).

souri, Illinois, Ohio, Kentucky, Tennessee, Virginia and West Virginia.

Pursuant to this Court's decision in *Van Dusen* v. *Barrack*, 376 U. S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964), the District Court in all cases transferred to it under 28 U.S.C.A. § 1404 was required to decide the issues as though it were the transferor court. *Kline* v. *Wheels by Kinney, Inc.*, 464 F. 2d 184, 185 (4th Cir. 1972); *Glick* v. *White Motor Co.*, 458 F. 2d 1287, 1293 (3rd Cir. 1972); *Bott* v. *American Hydrocarbon Corp.*, 441 F. 2d 896, 899 (5th Cir. 1971). The transferee court was required to apply the substantive law of the transferor court, *In re Plumbing Fixtures*, 342 F. Supp. 756 (JPML 1972), including its conflict-of-laws rule. *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851, 858 (2d Cir. 1965). The District Court was required, therefore, to determine whether or not valid claims for indemnity and/or contribution were stated exactly as New York, New Jersey, Connecticut, Missouri, Illinois, Ohio, Kentucky, Tennessee, Virginia and West Virginia transferor courts would have decided the issue.

In addition to the issue as to which law transferor courts would apply, there existed a number of the usual forum selection units which may well have justified the selection of another jurisdiction's law. For example, the *Moore* case involved a Missouri resident suing in Illinois; *Alexander* involved a New York resident suing in Indiana; *Buchenberg* involved a Maryland resident suing in Illinois; *Conover* involved a Connecticut resident, domiciled in Massachusetts at the time the cause of action arose, suing in Connecticut; *Morgan* involved a Pennsylvania resident suing in Indiana; *Morgan, deceased Anderson* involved a North Carolina resident suing in Indiana; *Kirschbraun* involved a Texas resident suing in Indiana; *Smith* involved a California resident suing in Indiana; *Jagger, deceased*

*Powers* involved a Colorado resident suing in Indiana; *Gillispie* involved a Virginia resident suing in Illinois; *Martinson* involved a Tennessee resident suing in Illinois; *Kulinski* involved an Indiana resident suing in Illinois; *Bays* involved an Ohio resident suing in Illinois; *Fields* involved a Kentucky resident suing in Ohio; *Wientjes* involved an Illinois resident suing in Ohio; and *Whaley, deceased Picton-Warlow* involved an Australian decedent traveling in International transportation subject to the Warsaw Convention at the time of his death, the administrator of whose estate commenced suit in Indiana.

Furthermore, in all of the jurisdictions wherein the present cases originated, the public policy of the forum, whether by statute or judicial decision, was to favor contribution and/or indemnity. As the District Court observed in *Kantlehner, supra*:

> "The forum state always has some interest in the application of its own law . . ." 279 F. Supp. at 127.

Indeed, Professor Ehrenzweig has preferred to think of restitution (which includes indemnity and contribution) as primarily a matter of remedy, to which a forum court should feel free to apply its own rules of law:

> "Once a tortfeasor has made good on the loss caused by him, he will, under the common law, not be permitted to seek recoupment from another tortfeasor. Originally this rule was justified on the ground that the law will not aid a wrongdoer. But this rationale has lost all meaning with regard to enterprise liability for negligence without fault. Although the rule today will usually be rationalized therefore against the background of this enterprise liability on the ground that redistribution of an accidental loss once distributed will not be favored, this rule has in many jurisdictions been superseded by statute. In conflicts cases of this kind, the forum has no reason for apply-

> ing a foreign law. Neither had the plaintiff relied on a contribution when he committed his tort, nor the defendant on freedom from ultimate liability when he himself engaged in his tortious act. In any event application of the law of the fortuitous place of accident is as uncalled for here as it is elsewhere." Ehrenzweig, *Restitution in the Conflict of Laws: Law and Reason versus the Restatement Second,* 36 N.Y. U. L. Rev. 1298, 1308-1309 (1961).

Since the Indiana rule (as interpreted by petitioners) of no-contribution among joint tortfeasors stems from the outmoded belief that Indiana courts will not trouble themselves with apportioning fault (*Cleveland, etc., R. Co.* v. *Hilligoss,* 171 Ind. 417, 86 N. E. 485 (1908)), it would appear that where the forum state does have a public policy in favor of contribution it should apply its own law and allow contribution. Wade, *Joint Tortfeasors and the Conflict of Laws,* 6 Vand. L. Rev. 464 (1953).

In addition, once recognition is made of the fact that claims for indemnity and contribution seek restitution and are based upon equitable considerations of unjust enrichment, then a significant factor in making a choice-of-law determination is knowledge as to where the settlement was consummated, where orders of compromise were entered, where releases were signed and where payments were made. *Wilson & Co.* v. *Douredoure,* 154 F. 2d 442, 444 (3rd Cir. 1946). As Professor Leflar points out in his treatise American Conflicts Law (1968):

> ". . . It might reasonably be argued, however, that the right to contribution or indemnity grows out of the payment by one tortfeasor of what the other tortfeasor should pay, so that the claim is one based on unjust enrichment, in the nature of quasi-contract, and therefore should be governed by the law of the place where the other tortfeasor's obligation was discharged by overpayment." § 142, pp. 349-350.

As to choice-of-law determination in quasi-contractual situations, Professor Leflar states:

> "There is no segment of the law in which it will be easier than in this for courts to deal with conflicts cases by frank reference to the relevant choice-influencing considerations. In neither law nor equity have mechanical rules been developed or accepted for restitution cases. * * * Nearly every type of quasi-contractual claim can be characterized as sounding also in some other familiar field of law, and few cases have for conflicts purposes been given a quasi-contracts characterization. Thus a right to contribution between tortfeasors, arising when one joint tortfeasor has discharged more than his proper share of the common liability, might be deemed to come into existence if at all at the place where the common liability was discharged by the claimant, but it has usually been called a torts problem so that the law of the place of tort, or whatever law the court applies to the tort claim, is held to govern. The problem in indemnity cases is substantially similar. * * *
>
> If restitution problems be analyzed in terms of the five summarized choice-influencing considerations, the conclusions to be arrived at will at least not be mechanical, and will be understandable. Predictability of results (A) will be important only if the transaction out of which the claim arose was undertaken in reliance upon some particular state's law, which will sometimes but not often be true. Maintenance of interstate orderliness (B) and simplification of the judicial task (C) will almost never be relevant in quasi-contracts cases. But the advancement of the forum's governmental interests (D) and the forum's preference for application of what it regards as the better rule of law (E), perhaps its own, can almost always enter into a restitution decision." American Conflicts Law, § 157, pp. 387-388.

Besides the public policy considerations of the forum state referred to above, other facts that the District Court would have to consider in making a choice-of-law decision are:

(1) The domiciles of the deceased passenger and his next of kin, including the interest of the jurisdiction exercising probate jurisdiction over the decedent's estate and the rights of creditors to the assets of that estate.

(2) The interest of the jurisdiction wherein the decedent purchased his ticket, where he boarded the aircraft, his destination, and whether the place of the accident was merely fortuitous.

(3) The interest of the state of incorporation and states wherein business is conducted by the defendants and third-party defendants.

(4) The interest of the jurisdiction wherein the various acts of negligence were committed, and, if different, the interest of the jurisdiction wherein the injury occurred.

(5) The interest of the jurisdiction where the relationship, if any, between the parties is centered.

(6) The extent to which any of the foregoing interests is rendered insignificant because of insurance coverage, and, if liability insurance exists, the nature and extent of coverage and the interests of the insured and insurer.

(7) The jurisdiction where the settlements were consummated, orders of compromise entered, releases signed,[4] and payments made.

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[4] See *Manos* v. *Trans World Airlines, Inc.*, 295 F. Supp. 1166 (E.D. Ill. 1968), for a choice-of-law analysis as to the effect of a release on the liability of a joint tortfeasor.

Restatement Second, *Conflict of Laws*, §§ 6, 145, 173, 221; *Goodrich, Conflict of Laws* §§ 92, 93 (4th Ed., Scoles, 1964).

Respondent Allegheny Airlines would submit that if the federal courts are to bind themselves to state choice-of-law theories in this type of multidistrict litigation, then the District Court must make a case-by-case analysis of all relevant facts in order to determine which law shall be applied. *Kantlehner* v. *United States*, 279 F. Supp. 122 (E.D.N.Y. 1967); *Emmert* v. *United States*, 300 F. Supp. 45 (D.C. 1969); *Madrin* v. *Wareham*, 344 F. Supp. 166 (W.D. Pa. 1972); *Ryer* v. *Harrisburg Kohl Brothers, Inc.*, 53 F.R.D. 404 (M.D. Pa. 1971). Such an analysis would lead, in respondent's opinion, to the rejection of Indiana law[5] and adoption of the law of either the transferor forum state or the state wherein the unjust enrichment occurred. It was therefore clear error for the District Court to apply the law of Indiana.

In comparison with this laborious approach to the problem, the Court of Appeals recognized that this was an ideal case for the application of federal law, rather than state law. As Mr. Justice Douglas recently pointed out in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 92 S. Ct. 1385, 31 L. Ed. 2d 712 (1972):

> "When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . ." 406 U. S. at 103.

Indeed, how can there be anything else but a federal common law governing the rights and liabilities arising out of a mid-air collision when Congress has unequivocally declared:

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[5] In *Bennett* v. *Macy*, 324 F. Supp. 409 (W.D. Ky. 1971), the Court rejected the application of Indiana law to an Indiana accident which would have benefited an Indiana resident. Accord, *Gross* v. *McDonald*, 354 F. Supp. 378 (E.D. Pa. 1973).

> "The United States of America is hereby declared to possess and exercise complete and exclusive sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction." 72 Stat. 798, 49 U. S. C. A. § 1508(a).

Federalization of air commerce and of the rights and liabilities of persons engaged therein has been recognized and sanctioned by the Supreme Court and other federal courts on numerous occasions. *City of Burbank* v. *Lockheed Air Terminal*, 411 U. S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973); *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 303, 64 S. Ct. 950, 88 L. Ed. 1283 (1944); *United States* v. *City of New Haven*, 447 F. 2d 972 (2d Cir. 1971); *Archibald* v. *Pan American World Airways, Inc.*, 460 F. 2d 14 (9th Cir. 1972); *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956); *Gabel* v. *Hughes Air Corp.*, 350 F. Supp. 612 (C. D. Calif. 1972); *Lulo* v. *Saturn Airways, Inc.*, no off. rep., 12 C. C. H. Avi. 17,953 (S. D. N. Y. 1973); *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360 (S. D. Calif. 1961); *Mortimer* v. *Delta Air Lines*, 302 F. Supp. 276 (N. D. Ill. 1969); *Doe* v. *Civil Aeronautics Board*, 356 F. 2d 699, 701 (10th Cir. 1966); *United States* v. *Christensen*, 419 F. 2d 1401 (9th Cir. 1969); *Air Line Pilots Association* v. *Quesada*, 276 F. 2d 892 (2d Cir. 1960); *Air Line Pilots Association* v. *Federal Aviation Administration*, 454 F. 2d 1052 (D. C. Cir. 1971); *American Airlines, Inc.* v. *City of Audubon Park, Kentucky*, 297 F. Supp. 207 (W. D. Ky. 1968), aff'd 407 F. 2d 1306 (6th Cir. 1969).

It is clear that where there is a predominantly federal interest involved or where federal uniformity is required, the courts develop a federal common law to govern the

situation. Note, *Toward a Workable Rule of Contribution in the Federal Courts,* 65 Col. L. Rev. 123 (1965); *Illinois* v. *City of Milwaukee, supra; Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 421-427, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456-7, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957); *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943); *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447, 455-6, 62 S. Ct. 676, 86 L. Ed. 956 (1942); *Kansas* v. *Colorado,* 206 U. S. 46, 98, 27 S. Ct. 655, 51 L. Ed. 956 (1907); Wright, The Law of Federal Courts, § 60 (2d Ed. 1970).

Since in the instant action Allegheny Airlines, as a certificated common carrier by air, was operating its Flight 853 in interstate commerce in the national airspace pursuant to the direction, instruction and control of the Federal Aviation Administration, the rights and liabilities arising out of this mid-air collision are peculiarly federal in nature and should be governed by federal law.[6] Haller, *Death in the Air: Federal Regulation of Tort Liability a Must,* 54 A.B.A.J. 382 (1968); Note, *Conflict of Laws—Desirability of Federal Legislation in Commercial Aviation,* 18 Vand. L. Rev. 1632 (1965).

The Federal Tort Claims Act presented no obstacle to such a result since, pursuant to its provisions, the liability of the United States is to be determined ". . . in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (b). Assuming the Government's negligent act occurred in Indiana, then the entire law of Indiana, including its conflict-of-laws rules, must be applied. *Richards* v. *United States,* 369 U. S. 1, 82 S. Ct.

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[6] See 3 Moore, Federal Practice ¶ 14.29 (2d Ed. 1963), wherein he states: ". . . the common law rule of no-contribution is outmoded, unsatisfactory, and is yielding to the more equitable rule of contribution; . . . here is a situation for a touch of creativeness" (p. 768).

585, 7 L. Ed. 2d 492 (1962). Since Indiana applies the law of the jurisdiction with the most substantial interest in the controversy (see footnote 1, *supra*), it was perfectly proper for the Court of Appeals to conclude that federal interests were predominant and federal law should be applied.[7]

Once this decision was made, it was only logical for the Court of Appeals to rule that the issues of indemnity and contribution should be decided on the basis of comparative negligence. Certainly, this Court has always shown a preference for comparative negligence in indemnity actions, *United States* v. *Seckinger*, 397 U. S. 203, 90 S. Ct. 880, 25 L. Ed. 2d 224 (1969); cf. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, —— U. S. ——, 94 S. Ct. 2174, 42 Law Week 4795, fn. 3 (May 28, 1974), and *United States* v. *Reliable Transfer Co.*, 497 F. 2d 1036 (2d Cir. 1974), cert. granted No. 74-363, and the States are moving in the same direction as evidenced by the growing acceptance of the doctrine of comparative negligence and the widely heralded decision by the New York Court of Appeals in *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 143, 282 N.E. 2d 288 (1972), which mandated the application of comparative negligence in indemnity actions. Cf. *Hurdich* v. *Eastmount Shipping Co.*, 503 F. 2d 397 (2d Cir. 1974).

Based upon the foregoing, respondent Allegheny Airlines, Inc., submits that the decision by the Court of Appeals herein was correct and not in conflict with the decisions of any other Courts of Appeals.

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[7] Professor Moore for years has advocated that there should be one uniform federal law of indemnity where the United States is a party to the litigation. 3 Moore's Federal Practice ¶ 14.29.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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